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CUPRINS

La doctrine quand elle approche les défauts de la volonté étend le carcatère ignoble de l'influence du dol et la renonciation à la succession[38]. De plus, on peut aussi rencontrer l'erreur (de fait et de droit, lorsque pardonnable et constituant la cause déterminante de l'acte d'option) et la violence. Dans le cas du second thèse de l'article 694 du Code Civil, l'erreur de l'émolument successoral est défaut de volonté seulement en ce qui concerne l'acceptation de la succession.

La lésion peut être raison de nullité de l'acceptation quand on heurte les quatres conditions cummulatives: 1) un testament, inconnu au moment de l'acceptation, qui soit découvert ultérieurement; 2) le testament découvert contienne des legués; 3) les nouvelles dispositions testamentaires absorbent plus de la moitié de l'actif de la succession; 4) par l'effet de la découverte du testament l'héritier acceptant ait endurer une lésion[39].

c. L'objet. La cause. Conditions de forme

Tous les actes d'option successorale ne sont pas régis par le principe du consensualisme selon lequel l'acte juridique est valablement fait par la simple manifestation de volonté des parties. Des actes d'option successorale qui se trouvent dans ce domaine, on rémarque seulement l'acceptation pure et simple de la succession. Exception à ce principe, on connaî la forme requise ad validitatem, qui incombe une certaine solemnité. Nous parlons ici de l'acceptation sous bénéfice d'inventaire et de la renonciation à la succession appréciées comme actes sollenneles. Pour ne pas être frappé par nullité, il faut que leur objet soit légal et possible, donc ne pas constituer un pacte sur une succession future, encore ne pas ouverte, comme dit l'article 965 alin. (2) du Code Civil. En plus, il faut aussi que la cause soit réele, légale et morale.

d. Sanctions

La violation des conditions de validité de l'acte d'option successorale attire la nullité selon le droit commun. C'est précisement pour cette raison qu'on dit que l'option ne peut pas être nulle ou annullable. Elle est annullable si on ne respecte pas les conditions de capacité (par exemple, lorsqu'on viole les disposition des art. 105 et 129 alin. (2) du Code de la Famille) et s'il y existe des défauts de consentement. Pour les défauts de consentement, l'acte d'option sera declaré nul. Similarement, la nullité intervient lorsque les conditions regardant l'objet et la cause sont violées.

La conséquance est la clôture de l'acte à effet rétroactif et donc la possibilité d'une nouvelle option pour le successible dans le délai de prescription du droit d'option successorale.

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p. 267, note en bas de p. no. 2, considère que on discute quand même d'une violence qui est cause d'anuller l'acceptation parce qu'elle apporte atteinte plutôt à la liberté de consentement qu'au dol.

[38] A. Vișan, *Cu privire la cazurile de ineficacitate a renuntarii la succesiune* (*Regardant les cas d'inéficacité de la renonciation aux successions*), article publié en RRD no. 2/1985, p. 20 et suiv.: Dans le cas de la renonciation le dol est constitué par une erreure provoqué intentionnellement par un héritier ou un tiers, à cause duquel le renonçant rédige la dvclaration de renonciation. Pour la nullité il faut que les moyens malicieux contiennent l'élément intentionnel et qu'ils soient déterminants pour la clôture de l'acte juridique. Les formes du dol en cas de renonciation à la succession sont la captation et la suggestion.

[39] M. Eliescu, *op. cit.*, p. 115, 116.

The public law and the private law nature of citizenship

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Citizenship was initially considered as belonging to the field of private law[1]. Its first appearance in statutory provisions can be linked to the Code Civil[2]. It was the emergence of the theory of sovereignty that meant the fundamental change. According to Csizmadia, contrary to the laws of Western Europe, the rules pertaining to citizenship always appeared in Hungary in legislation proposed in the area of public law[3]. Eöttevényi stated as a basic tenet that citizenship is a legal relationship under public law.[4] In time, citizenship got rid of its private law character, Vutkovich holds".The concept of citizenship is entirely permeated by the spirit of public law"[5]. According to Baintner, citizenship was only of private law nature to the extent that it had an influence on the legal capacity of persons. All other consequences of citizenship, in his opinion, belong to the field of public law[6].

[1] During the parliamentary debate of the first citizenship law, Pál Hoffmann declared that in the Middle Ages, citizenship was considered as part of private law. P. Szathmáry K. (ed.), *Az 1878. évi október 17-ére hirdetett országgyűlés Képviselőházának naplója.* [The Journal of the Parliamentary Session of 17 October 1878] Vol. VII. Budapest, 1880. p. 291.

[2] Klára Fürész, Az állampolgárság [Citizenship]. p. 247. In: Kukorelli, I. (ed.): *Alkotmánytan* [Constitutional law] *I. Alapfogalmak, alkotmányos intézmények* [Basic concept, constitutional institutions]. Budapest, 2007. In Hungarian law, it is owing to the work of László Szalay, Győző Concha and Ödön Polner that citizenship, starting from state sovereignty, became a part of public law. French citizenship law is among the provisions of the Code Civil. Kállai G., *A közjog alapjai* [The foundations of public law]. Budapest, 2005. p. 113. From the point of view of European development, Barnabás Hajas also emphasized the importance of the Code Civil. In his opinion it became generally accepted in the second half of the 19th century that citizenship law does not fall under the scope of private law. Barnabás Hajas: Az állampolgárság [Citizenship]. p. 259. In: Kilényi G., Hajas B. (ed.), *Fejezetek az alkotmányjog köréből* [Chapters from the area of constitutional law]. Budapest, 2005. Austrian private law also regulated citizenship, and consequently, we can find the provisions applicable to the acquisition and loss of citizenship among the rules of the Austrian Civil Code. Haller K. (Hilibi), *Az általános polgári törvénykönyv, mint ez jelenleg Erdélyben érvényes* [The gerenal civil code, as currently in effect in Transylvania]. Kolozsvár, 1865. p. 35-38. Csizmadia also emphasized the importance of these two European codes. Csizmadia A., *A magyar állampolgársági jog fejlődése* [The development of Hungarian citizenship law]. Állam és Igazgatás, Vol. XIX. no. 12. 1969. p. 1079. See also: Korbuly I., *Magyarország közjoga illetőleg a magyar államjog rendszere kapcsolatban az ország közigazgatási szervezetével* [The public law of Hungary and the system of Hungarian state law in relation to the administrative organization of the country]. Buda-Pest, 1874. p. 218. Common law, however, does not use the distinction between public law and private law. Eörsi Gy., *Összehasonlító polgári jog* [Comparative civil laws]. (Jogtípusok, jogcsoportok és a jogfejlődés útjai. [Types of law, groups of law, and paths of legal development) Budapest, 1975. p. 86.

[3] Csizmadia, 1969. p. 1079.

[4] Eöttevényi N. O., *A magyar közjog tankönyve* [The textbook of Hungarian public law]. Kassa [Kosice], 1911. p. 60.

[5] Vutkovich S., *Magyar alkotmányjog* [Hungarian constitutional law]. Pozsony [Bratislava], 1904. He does not deny that citizenship has certain provisions that are related to private law. He did, however, add that the state law, i.e. the public law aspect of citizenship is the stronger of the two. Op. cit. p. 171-172.

[6] Baintner J., *Az ausztriai általános magánjog alaptanai tekintettel a római jogra, s a franczia és szászországi polg. törvénykönyvre. Függelékkel, ez elveknek a magyar jogéletre való alkalmazásáról* [The foundations of the general private law of Austria, with respect to Roman law as well as the civil codes of France and Saxony. With supplement on the application of these principles to Hungarian legal practice]. Pest, 1868. p. 114.

The emergence and the regulation of the concept of citizenship was closely related to state sovereignty, from which it followed that the state was able define the conditions of acquiring and losing it. This is why the statement of József Petrétei that citizenship law is a part of constitutional law is correct[7]. Citizenship is a legal relationship belonging to the field of public law, in which legal relationship one of the parties is the state as the „depositary" of sovereignty[8].

The creation of the nation states was an important milestone in the legal evaluation of citizenship. Before the bourgeois transformation the rules of citizenship belonged to the field of private law. The change in the Hungarian name of the concept (from „honfiúság" to „állampolgárság") also indicated the process whereby now it was the state („állam") that determined the rules of citizenship in the framework of its sovereignty. According to Mária Maczkó, the cause for this change was that „the evaluation, the actual regulation and the content of citizenship varied from one historical situation to another"[9]. She regards citizenship a legal relationship under public law, because it belonged to the regulatory scope of the internal law[10].

It was a generally accepted tenet that that the provisions of law regulating state activities belong to the field of public law, while those regulating the acts of private individuals belong to the field of private law. This did not mean that there were not legal relationships affected by both fields of law. Gyula Moór examined from the point of view of the content of the legal relationships what belonged to the field of public law. In his opinion, if a legal area regulated a state activity, then it definitely belonged to the field of public law[11]. According to Vilmos Szontagh, it was possible to decide what a given field of law regulated on the basis of the subject of the regulation. This meant that what had to be examined whether a state organ acted in a given case as the subject of the provision of law. In my opinion, this is entirely the case in connection with citizenship law.

Of course, a state organ could also apply private law. The law determining state activities belonged to the field of public law[12]. According to Szontagh, „we are faced with a philosophical issue, a necessity, and the task is nothing else than demonstrating the difference between the specifics of the two types of provisions of law"[13]. In the opinion of Moór, instead of the terms private law and public law, it would be more appropriate to use the phrases „the law of the state" and „the law of private individuals"[14]. This meant that the state exercised the rights attached to it, and consequently, in the legal relationship arising the state acted as a subject of the law.

[7] Petrétei J., *Magyar alkotmányjog* [Hungarian constitutional law]. I. Budapest-Pécs, 2002. p. 214. Kállai mentions citizenship as one of the main components of state sovereignty. Kállai, 2005. p. 114.

[8] Csink L., Rixer Á., *Alkotmányjog és közigazgatási jog* [Constitutional law and public administration law]. Budapest, 2006. p. 55.

[9] She traces it back to Rousseau that citizenship belonged to the field of private law. Maczkó M., *Magyar alkotmányjog* [Hungarian constitutional law]. Budapest, 2005. p. 50.

[10] She did not forget, however, that citizenship law has certain elements of international law as well, which can also be regulated in international treaties. Op. cit. p. 50. Petrétei also calls attention to the importance of the rules of international law. Petrétei, 2002. p. 214.

[11] Szontagh V. (Iglói), *Közjog magánjog elválasztása* [The separation of public law and private law]. Jogállam, Vol. XXXVII. 1938. p. 172-181.

[12] In this respect, Szontagh accepted Moór's definition. Op. cit. p. 174.

[13] Op. cit. p. 174.

[14] Moór Gy., *A jogrendszer tagozódásának problémája* [The problem of the structure of the legal system]. Budapest, 1937. passim.

The state was always on the one side of this legal relationship. This definition followed from the conceptual element of citizenship. According to Szontagh, the public law relationship was not affected by the question whether the state used this opportunity or not, since the state was able to apply any law, even private law[15]. This is why we can find provisions of private law in the citizenship act, which were enforced by the state. The rules of public law were consistently created in such a way that one of its subjects was always the state or a state organ".Therefore, if the given law regulated a legal relationship in such a way that it makes the state (or organ of the state) the subject of the legal relationship, then the provision concerned belongs to public law[16]. On the basis of the content elements of citizenship, it is beyond debate that the rules of citizenship belonged to the field of public law. The emphasis was, therefore, on the issue that in case we designate the state as one of the subjects of the law concerned, such as in the case of citizenship, then the legal relationship belongs to the category of public law.

Provisions concerning situations related to the state have always belonged to the field of public law. Contrary to public law, the subject of legal relationships in the field of private law was not specified. This was declared *expressis verbis* by individual provisions of law. This was also true for the act of 1879 regulating citizenship, since on one side of the legal relationship was the state, with the minister of the interior, the „bán" of Croatia or, in exceptional cases, the king acting in its name, after the case was submitted by the first officer of the municipalities (the deputy lieutenant or the mayor).

Szontagh agreed with the opinion of Moór that a factual element of public law is that it must contain acts by the state. This was the *conditio sine qua non* part of public law. Citizenship could not be either acquired or lost without the active conduct of the Hungarian state. The minister of the interior had to sign the deed of naturalization or loss of citizenship, which was sufficient for us to regard this legal relationship as belonging under the scope of public law.

The law concerned designated the state as a subject of this legal relationship, and consequently, in each of these cases we were dealing with a legal relationship under public law. This meant that the status of the party standing vis-à-vis in the legal relationship also became subject of public law. If it can be stated that the state (or state organ) is designated a subject in a given legal relationship then the field of law regulating this legal relationship in its entirety is necessarily public law"[17]. This situation was not altered even if the state performed an act that belonged to the field of private law. In case of citizenship these included the rules concerning adoption, legitimation and marriage.

Concerning the subjects of legal relationships, István Kovács declared that public law included all legal relationships in which, on one side, there are state organs acting in their capacity of public authority, even if on the other side we find private individuals. He regarded this definition as „organic," since it was the subjects of the legal relationship that determined its structure[18].

[15] Szontagh, 1938. p. 175.

[16] If we continue this logical reasoning, everything else will belong to private law, the subject of which can be natural persons or the state as well. In legal relationships under public law, however, the state always had to be one of the parties. Op. cit. p. 176.

[17] Op. cit. p. 178.

[18] Kovács I., *Magyar alkotmányjog* [Hungarian constitutional law]. I. Szeged, Kolozsvár, 1990. p. 1-2. In addition to the

It had to be examined whether the legal relationship under public law had elements of private law. The question is whether the existence of citizenship could have an effect on the private law status of a person and whether the private law acts of an individual could have an effect on the legal relationship of citizenship.

The constitutional aspect of citizenship meant that the granting and loss of citizenship was determined by the given country. It follows from the sovereignty of the state that the country concerned has the right to determine the content of citizenship law. This meant that the state was able to define whom to admit to the territory of the country, whom to recognize as a Hungarian citizen and whose citizenship to terminate. This right of the state was the most extensive in case of absolute monarchies, since depriving one of his citizenship could be used for the purpose of getting rid of political adversaries.[19]

It was not reconcilable with the public law aspect of citizenship law for an individual to be able to acquire or lose his citizenship by way of a unilateral declaration of will".From the numerous definitions of public law, we can find none from which it would follow that a person could render himself as subject of a legal relationship under public law simply by way of a unilateral declaration of will"[20]. This cannot be recognized either because if anyone could change their citizenship on any day by simply declaring to do so, then this would make it possible to evade obligations attached to citizenship. The opposite was also true, since an individual could acquire his citizenship at any time when it means advantages to him. Citizenship could not be entirely an issue of personal freedom, all the more so since the majority of people acquired their citizenship by birth[21]. Citizenship and free will were reconcilable to the extent that a foreign national could decide whether he or she wanted to acquire citizenship or leave the bounds of a given state; however, this decision had to be combined with an act of the state, which made it necessary for „an act of public authority, a permission, which settles this public law relationship between the individual and the state"[22].

Citizenship could not have an effect on the legal status of the individual concerned under private law, since citizenship was merely a public law legal relationship. Lajos Szamel also admitted that this principle is compromised in a certain ways. The first such cased concerned the holding

subject side, however, he also attributed an important role to the object of the legal relationships, as well as to the so-called „formal criteria." In his opinion, from the point of view of the object, the emphasis was on public interest. By formal criteria of legal relationships he meant the mode, the strength and the sanction of the expression of will. The subject of citizenship belongs in the field of constitutional law in which „the ethos of the given state on itself is best expressed." Hargitai J., *Az állampolgárság a nemzetközi jogban* [Citizenship in international law]. (Gondolatok az új alkotmány szabályozási koncepciójáról [Some thoughts on the regulatory concept of the new constitution].) Magyar Jog, Vol. 43. 6 September 1996 p. 705.

[19] Lajos Szamel, Az állampolgársági jog közjogi (alkotmányjogi és közigazgatási jogi) illetve magánjogi jellegéről [On the public law (constitutional and administrative law) and the private law nature of citizenship. p. 333. In: Tóth K. (ed.), *In memoriam Dr. Kovács István akadémikus, egyetemi tanár* [In memoriam Dr. István Kovács, member of the Academy, university professor]. Acta Universitatis Szegediensis de Attila József Nominatae Acta Juridica et Politica. Tom. XL. Fasc. 1-26. Szeged, 1991. The same study also appeared in: Szamel L., *Az állampolgárság reformjáról* [On the reform of citizenship]. Budapest, 1990. p. 19-38.

[20] Szamel, 1991. p. 333.

[21] From this point of view it is entirely indifferent whether the citizenship was acquired under the principle of *ius sanguinis* or *ius soli*. Op. cit. p. 334.

[22] Op. cit p. 334.

of property, especially the acquisition of real property. States protected agricultural lands and forbad foreign citizens to acquire ownership. This protection also extended to the industry, since states did not want domestic companies to be acquired by persons of foreign citizenship. Reasons related to economic policy were in the background of these rules.

The second case was the field of inheritance law, since foreign citizens were disherited. In the final case it was the state's right of inheritance that took effect. A more lenient solution was when foreign citizens could inherit, but were not allowed to take their inheritance abroad.

Provisions of law concerning taxes, fees and customs also differentiated between citizens and aliens, thus also indirectly affecting their status under private law.

Finally, the rules of labour law were formed in such a way that the employment of foreigners could be limited or tied to permits. Foreigners could be in the disadvantageous situation that the permits were issued for a fixed term only[23].

Within the field of citizenship law, aliens were unable to exercise the following rights of public law origin: they were unable to obtain a title of nobility, to receive remuneration from churches, to elect or to be elected, to be members in municipal committees, to serve as municipal electors, to have offices in state or municipal administration, to be members of the Hungarian army, to summon comitial meetings, to establish secondary schools; they could be expelled from the country, they had to register their intention to settle in a municipality, and they could not be members of the legislature for ten years after their naturalization[24]. Private law also restricted the rights of foreign citizens in the following areas: marriage, guardianship, custodianship, pauper right, hunting, „promissory transactions," peddling, the registration of intellectual property protection, patents, mediation of immigration, pledge right, obtaining a patent agent's license, the right of intellectual property, rights attached to place of residence, right of membership in corporate bodies of credit unions[25].

The biggest debates concerning public law emerged in connection with the consequences of citizenship under private law. One such debated issue was whether marriage could have a role in citizenship law. If the answer is yes, a further question that emerged is whether it should be only the citizenship of the husband that matters, or the principle of reciprocity should be used between the genders. The main reason why marriage as a legal title for acquiring and losing citizenship was opposed was because it occasioned the conclusion of „paper marriages". It was not only that citizenship could be acquired this way, but it also had consequences under private law. In connection with the loss of citizenship, the counterargument was mentioned that it may give rise to a situation whereby someone loses his or her citizenship without acquiring the

[23] Concerning the rights of aliens, see: Récsi E., *Magyarország közjoga a mint 1848-ig s 1848-ban fenállott* [The public law of Hungary until and in 1848]. Buda-Pest, 1861. p. 281-282.

[24] The above rules are contained in the following provisions of law: Act L of 1879, Act 30-32 of 1495, Act 98 of 1647 Act XLIII of 1895, Act XXXIII of 1874, Act XXI of 1886, Act XXII of 1886, Act I of 1883, Act IV of 1869, Act XXXI of 1891 Act XXVI of 1896, Act XXXIII of 1871, Act XXXIV of 1874, Act VII of 1886, Act XXXIII of 1897, Act XXXIII of 1894, Act VI of 1889, Act XXX of 1883, Act XXII of 1886.

[25] Related provisions of law: Act XXXI of 1894, Act XX of 1877, Act XVIII of 1893, Act XX of 1883, Act II of 1890, Act XXXVII of 1895, Act XXXVIII of 1881, Act XXXVII of 1895, Act XVI of 1884, Act XXIII of 1898.

citizenship of another country, and the person thus becomes stateless. Similarly, also subject of debates in the literature is whether the conclusion of marriage subsequent to the birth of children and recognition by a parent should have a place in citizenship law. In this case the possibility of collusion between the parties can be present. Adoption also gave rise to similar questions[26].

These acts fall under the scope of private law. According to Szamel, the essence of the issue is not classification under the appropriate field of law but rather inherent to the fact that „these acts belong to the individual's sphere of freedom and competence of decision, and the state is not allowed to intervene in these issues by way of the force of public authority"[27].

It was in conflict with the public law nature of citizenship if it were possible to conclude transactions of private law the object of which would have been the acquisition of citizenship. According to Szemel, this would have been eerily similar to making the payment of a certain amount, a fee, as the condition of the acquisition of citizenship. In this case, such amount could be seen as the price of citizenship.

The public administrative aspect of citizenship is not debated, since the administration of issues of citizenship took place in a state administrative procedure". From the point of view the public law or private law nature of citizenship, and specifically from the perspective of tying the acquisition and losing of citizenship to acts of private or public law, we can hardly speak of consistence or unambiguous traditions in Hungarian law"[28].

We must examine to what extent the public law and the private law aspects were enforced in connection with our first citizenship law. Legitimation was an act of family law and not public law, whereby the child of a Hungarian male citizen born to a woman of foreign nationality gained Hungarian citizenship. Marriage also belonged in the category of family law whereby a woman of foreign nationality acquired Hungarian citizenship. Naturalization took place by way of a deed issued by the minister of the interior or by a charter granted by the head of state. In this case, the public law aspect is beyond debate. Naturalization on the basis of an application did not constitute an element of private law, as this application could not be considered as an offer in the private law sense of the word. The subject of the application was also a public law issue by its nature. In this sense the fact that the act of minister of the interior or the rule was of public law nature had no significance. The basis for the act of the ruler was the royal prerogative. According to the law, adoption could not be the basis of the acquisition of citizenship, but this element of private law did determine the acquisition of citizenship to the extent that adoption was regarded as a favorable circumstance. The act of family law was taken into consideration by the provision of law in the course of the naturalization process.

[26] In the case of Károly Winterholler, one could assume that a fictitious adoption agreement was concluded, since the adoption only took place after the rejection of the application by the minister of the interior. Magyar Országos Levéltár [Hungarian National Arhives] K 150. belügyminiszteri általános iratok [general documents of the minister of the interior], 1887. Source I, item 10, protocol no. 20159. base no. 3186.

[27] Szamel, 1991. p 336. In his opinion, the state cannot adopt legislation which would restrict Hungarian citizens in their freedom to conclude marriages with foreign nationals, in the exercise of their rights as parents or in adoption.

[28] Op. cit., p. 336.

The analysis of the loss of citizenship also yields some interesting results. Loss of citizenship could be regarded as having validly taken place by way of the public law act of consent being granted by the minister of the interior. This is why this legal institution was called by Szamel „negative naturalization"[29]. Applications for release from citizenship were usually consented to by the minister of the interior provided that the statutory conditions were met. In case of military serve, the consent of the minister of defense was also needed. Again, in this case, the public law aspect is cannot be debated. In case of deprivation of citizenship by way of an official decision of an authority, or administrative act, the decisive role of public law can also be demonstrated. According to the law, this was possible in a single case only, namely when the person concerned entered the service of a foreign state. Persons could lose their Hungarian citizenship due to reason of absence if they stayed abroad for an uninterrupted period of ten years after the law entered into effect".The elevation of the very act of absence as a cause for the loss of citizenship testifies to the dominance of public law aspect in the contemporaneous citizenship law"[30]. Legitimation was not only a legal title for the acquisition, but also for the loss of citizenship, similar to marriages. It this latter case it was indifferent whether the woman of Hungarian citizenship did acquire a citizenship by way of her marriage to a foreign citizen or not. A woman who was originally a Hungarian citizen could be readmitted to citizenship if she became widowed or divorced. In this case, the woman lost her citizenship as a consequence of her act belonging under private law, but the regaining of that lost citizenship took place by way of an administrative procedure, provided that she fulfilled the statutory conditions.

In the citizenship law, elements of public and private law were mixed, but to a different extent. It was clear on the basis of the examples discussed above that the public law aspect determined in the legal relationship of citizenship".The reason for this is inherent in the fact that in the statutory regulation of citizenship, principles in conflict with each other clashed, and these conflicts could also be resolved by way of compromises"[31]. Lajos Szemel was right in concluding that the exclusiveness of public law elements had to be decisive in citizenship law, since it was out of the question that an individual could acquire citizenship by way of his or her acts under private law in such a way that the state had no voice in this. In my opinion, this would have contradicted the very concept of citizenship and the sovereignty of the state.

The elements of private law present did not alter the classification of this legal relationship, since one of the parties in it was always the state. After the dogmatic reasoning it can be concluded that citizenship belonged in the field of public law, which contention was also supported by the literature.

[29] Op. cit. p. 337.

[30] In this case also it was the minister of the interior who made the decision on the loss of citizenship. Op. cit. p. 338.

[31] Op. cit. p. 341.